BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Dry Creek Coalition and Futurewise, Petitioners, v. Clallam County, Respondent.	Case No. 07-2-0018c **ORDER DENYING COUNTY'S MOTION TO DISMISS ISSUE 2 (ADUS)**

THIS Matter comes before the Board upon the County's motion to dismiss Issue 2 regarding ADUs as untimely.[1] Petitioner filed its response to the motion on December 28, 2007.[2] Neither party requested oral argument. Having reviewed the arguments of counsel, the petition for review, and the files and records herein, the Board denies the motion to dismiss Issue 2.

I. DECISION

Positions of the Parties

The County has moved to dismiss Issue 2, regarding accessory dwelling units (ADUs) in rural areas, as untimely. The County notes that the challenged provisions were enacted by the County in August 2002 through the County's adoption of Ordinance 725.[3] The County argues that the 60 day appeal period for challenges to that ordinance provided for by RCW 36.70A.290(2) expired on October 8, 2002.[4]

[1] Motion to Dismiss Futurewise's Issue 2 as Untimely.
[2] Answer to Clallam County's Motion to Dismiss Issue 2.
[3] Motion to Dismiss Futurewise's Issue 2 as Untimely, at 1.
[4] Id. at 4.

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The County also argues that the GMA update provisions of RCW 36.70A.130 do not renew the right to challenge an earlier enactment when there has been no intervening GMA amendment affecting the subject of that enactment. The County relies upon the recent Court of Appeals decision of *Gold Star Resorts v. Futurewise*[5] in support of its position that the update requirement of RCW 36.70A.130 applies only to those provisions of a comprehensive plan that have been affected by intervening legislative revisions. Because no relevant GMA provisions have been amended since Ordinance 725 was adopted, the County argues, Futurewise's Issue 2 is time barred and should be dismissed.[6]

In response, Futurewise argues that Issue 2 is timely raised for four reasons:

(1) Ordinance 725 was not an update pursuant to RCW 36.70A.130. Either Resolution 77 is the County's update or the County has failed to meet the deadline to review and revise its comprehensive plan under RCW 36.70A.130(1)(a) and (4).[7] In either event, Futurewise argues, it may now challenge any portion of the County's comprehensive plan and development regulations that should have been revised[8];

(2) As both the *Gold Star Resorts* and *Thurston County*[9] Court of Appeals decisions are under appeal to the State Supreme Court, neither has binding effect. Instead, this Board should follow the *Thurston County* decision, as the better reasoned one[10];

(3) The *Gold Star Resorts* decision is inconsistent with the Supreme Court's *McFarland*[11] decision and therefore the Board is bound to follow *McFarland*. Futurewise interprets the Supreme Court's decision in *McFarland* to mean that updates under RCW 36.70A.130 must

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[5] 140 Wn.App. 378, 166 P.3d 748 (2007), *petition for review filed.*
[6] Motion to Dismiss Futurewise's Issue 2 as Untimely at 4-6.
[7] Futurewise's Answer to Clallam County's Motion to Dismiss Futurewise's Issue 2 (Detached ADUs) as Untimely.
[8] Answer to Clallam County's Motion to Dismiss Issue 2, at 4.
[9] *Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wn.App. 781, 154 P.3d 959 (2007), *petition for review filed.*
[10] Answer to Clallam County's Motion to Dismiss Issue 2, at 10.
[11] *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2006) (Plurality opinion).

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comply with the entire GMA and that this opens up for challenge unaltered portions of the plan in the absence of changes in the GMA[12];

(4) The *Gold Star Resorts* language relating to the changes in the GMA is *dicta* and should be disregarded since the only parts of the Board decision that were appealed in that case addressed comprehensive plan provisions and zoning that was adopted by the county before the Limited Areas of More Intense Development (LAMIRD) provisions were adopted by the Legislature[13].

Board Discussion

The petition for review in this case challenges Resolution No. 77 and Ordinance 827 (related to limited areas of more intensive rural development).[14] Issue No. 2 challenges the County's failure to "prohibit detached accessory dwelling units at densities greater than one dwelling unit per five acres outside urban growth areas", the County's failure to review and revise comprehensive plan provision 31.02.280 and CCC 33.50.040, and the failure to "eliminate detached accessory dwelling units at densities greater than one dwelling unit per five acres outside urban growth areas."[15]

In 2002, the County adopted Ordinance No. 725, its plan provisions and development regulations regarding ADUs. Petitioners did not challenge this adoption. In 2007, the County adopted Resolution 77 as its update of its comprehensive plan and development regulations required by RCW 36.70A.130(1) and (4).[16] This update did not change the ADU plan provisions and development regulations adopted in 2002.

Although the County argues that the Petitioners did not timely challenge Ordinance No. 725, this point is not in question. Petitioners have challenged the adoption of Resolution 77, not the adoption of Ordinance No. 725. Instead, Petitioners allege that the County should have

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[12] Answer to Clallam County's Motion to Dismiss Issue 2, at 11.
[13] Id. at 13.
[14] First Amended Petition for Review at 2.
[15] *Ibid* at 4.
[16] Resolution 77.

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revised its policies and development regulations on ADUs when it reviewed and revised the comprehensive plan an development regulations as a whole through its RCW 36.70A.130(1) and (4) update.

RCW 36.70A.130(1)(a) requires a county or city to review and revise its comprehensive plan and development regulations by dates set for each jurisdiction in RCW 36.70A.130(4):

> Each comprehensive plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. Except as otherwise provided, a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and regulations and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.

The obligation to review and revise in accordance with the time lines established in subsection (4) is known as an "update":

> …"Updates" means to review and revise, if needed, according to subsection (1) of this section, and the time periods specified in subsection (4) of this section or in accordance with the provisions of subsections (5) and (8) of this section…

RCW 36.70A.(2)(a) (in pertinent part)

While there is a general "continuing" obligation to review and evaluate the plan and regulations, the update imposes a time line for reviewing and making needed revisions.

The County argues that it did not have to review and revise its ADU policies and regulations because there has been no change in the Growth Management Act (GMA) regarding ADUs since the County passed them.[17] Petitioners respond that an update under RCW 36.70A.130(1) and (4) allows all issues of compliance to be raised.

This Board has consistently held that the update requirement applies to all provisions of a comprehensive plan or development regulation.[18] While the Board agrees that one of the

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[17] Motion to Dismiss Futurewise's Issue 2 as Untimely at 4.

[18] Paradoxically, the dissent would have the Board over-rule its prior holdings based upon two court decisions which affirmed the Board's decisions in the underlying cases. In the Board decision underlying the *Gold Star Resorts* case, the Board said:. "In our Order on Dispositive Motions issued in this case on June 15, 2005, we determined that the update requirements of RCW 36.70A.130 impose an obligation upon the County to revise its

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reasons for the update requirement is to respond to changes in the GMA, the GMA does not distinguish between a need for revision caused by a change in the GMA and a need for revision caused by non-compliance generally. Indeed, it would have been relatively easy to make such a distinction in terms of the obligation to update by providing that the review was for the purpose of according with changes in the GMA only. No such language is in RCW 36.70A.130 nor is it suggested by any other provision of the Act.[19] The objective in statutory interpretation is to ascertain and give effect to the Legislature's intent as expressed by the plain language of the statute.[20] The Legislature should be presumed to have meant what it said and to have chosen to impose the broader obligation by choosing not to limit the update obligation to only conformity with changes in the law.

The update requirement should also be read in the context of the GMA overall. A comprehensive plan lays out the "blueprint" for planning in the jurisdiction, providing guidance to local officials and developers alike in making later project decisions. It is true, as the decisions of the courts of appeal have described[21], that the update requirement strikes a balance between finality of land use decisions and the need to accord with changes in the law. In addition to changes in the GMA itself, updates should incorporate board and court decisions on the applicability of GMA goals and requirements. By requiring periodic updates, RCW 36.70A.130(1) and (4) calls on counties and cities to incorporate legal changes and other changes as well – changes based on new information, new data,

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comprehensive plan to comply with the GMA, and that the County may not refuse to revise noncompliant plan provisions on the basis that it adopted them some time ago." 1000 Friends v. Whatcom County, WWGMHB Case No.05-2-0013 (Final Decision and Order, September 20, 2005) on appeal as *Gold Star Resorts v. Futurewise, et al.,* 140 Wn.App. 378, 166 P.3d 748 (2007). The County did not appeal that ruling by the Board so the Board's decision that the County has an obligation to review and revise its plan policies and development regulations relating to urban growth areas regardless of the lack of change in the GMA provisions on those issues was never reversed. The Board was affirmed on the issues which were appealed*; 1000 Friends v. Thurston County,* WWGMHB Case No. 05-2-0002(Final Decision and Order, July 20, 2005), on appeal as *Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wn.App. 781, 154 P.3d 959 (2007) affirmed the Board on the scope of an update obligation.

[19] Legislative intent is discerned from what the Legislature has said in its enactments but that meaning is discerned from all that the Legislature has said in the statute and in related statutes. *Ecology v. Campbell and Givens, L.L.C.,*146 Wn.2d 1 at 12 (2002).

[20] *State v. Gans*, 76 Wn. App. 445, 447 (Division I, 1994); *Hama Hama Corp. v. Shorelines Hearings Board,* 85 Wn. 2d 441, 445, 536 P.2d 157 (1975).

[21] *Gold Star Resorts v. Futurewise, et al.,* 140 Wn.App. 378, 166 P.3d 748 (2007)*; Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wn.App. 781, 154 P.3d 959 (2007).

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new planning and management practices, changing community conditions, and new science. The updates also encourage cities and counties and their citizens to evaluate the vision and direction encompassed in their plans, determine if their approach is working, and change direction if needed.

The update requirement is also important as a means for the citizenry to take part in land use decision-making. One of the hallmark provisions of the GMA is its insistence on the opportunity for the public to participate in land use planning decisions on an "early and continuous" basis.[22] The GMA imposes a narrow window of time for appeal of the adoption of comprehensive plans and development regulations. A petitioner has only 60 days from the date of publication of the adoption of such enactments to file a petition with the Board.[23] After that time, appeal is foreclosed and the plan and development regulations are presumed valid.[24] It is only reasonable, therefore, that the ability to challenge compliance with the state law on planning should not be forever barred on the basis of a one-time, narrow window of time. The update process gives citizens new to the planning process in their communities the ability to familiarize themselves with their community's plans and the goals and requirements of the GMA. After all, it is those who participate in the local planning process who assure that local plans and development regulations comply with the GMA, because they are the ones who can initiate an appeal. The update requirement thus is also important in providing the opportunity for citizens to bring new data, information, and best available science required for the development of plans and regulations to the attention of local decision-makers, In this way, the update requirement balances the desire for predictability of land use decisions with the ability of the public to participate on a periodic basis in ensuring that State goals and objectives for growth apply locally.

The County argues that this Board is bound by the decision of Division I of the Court of Appeals in *Gold Star Resorts,* finding that the update requirements only apply to require

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[22] RCW 36.70A.140.
[23] RCW 36.70A.290(2)
[24] RCW 36.70A.320

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conformity with changes in the GMA. In the case from this Board underlying the *Gold Star Resorts* decision, this Board had found that all provisions of a comprehensive plan and development regulations are subject to review and revision in an update.[25] This holding was not appealed by the County. Instead, the appeal of that case was brought by a private intervenor (Gold Star Resorts) who only raised issues pertaining to limited areas of more intensive rural development or LAMIRDs. Since the Legislature had amended the GMA to specify requirements for LAMIRDs, Division I of the Court of Appeals found that the County's LAMIRD provisions were subject to the update requirement. Division I went on to reject Futurewise's contention that all of the provisions of the comprehensive plan and development regulations were subject to the update requirement.[26] However, the applicability of the update requirement to the other provisions of the Whatcom County comprehensive plan and development regulations was not before the Court of Appeals since those issues were never appealed. In that sense, the statement in *Gold Star Resorts* that the update requirements of the GMA only apply to changes in the Act was *dicta.*

In the *Thurston County* case, Division II of the Court of Appeals upholds this Board's determination that the scope of issues raised in an update is not limited to either changes in local planning enactments or to amendments to the GMA.[27] The Court pointed out that a rule limiting update challenges to issues affected by changes in the GMA would require the Board to determine whether a GMA amendment was stricter than a prior provision. The language of RCW 36.70A.130(1) itself does not limit the scope of review to those affected by changes in the GMA, the Court noted, and found that this Board had appropriately determined that compliance with the GMA of any comprehensive plan policies and development regulations could be challenged in the seven-year update process.[28]

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[25] See footnote 17 above.
[26] "This does not mean, as Futurewise argues, that the county must revisit every aspect of its plan, only those which are affected by intervening legislative revisions." *Gold Star Resorts v. Futurewise, et al.,* 140 Wn.App. 378, 166 P.3d 748 (2007) at 389-390.
[27] *Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wn.App. 781, 154 P.3d 959 (2007).
[28] *Ibid* at 793.

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Petitioners urge that the Board is not bound by either of these decisions since both are on appeal. To the extent that either decision is binding authority, this case falls within the jurisdiction of Division II of the Court of Appeals which upholds this Board's determination that the update requirements of RCW 36.70A.130(1) and (4) apply to all provisions of a comprehensive plan and development regulations. Since the *Gold Star Resorts'* holding that the update does not extend past changes in the GMA is *dicta,* we find it is not binding authority on that basis as well.

Petitioners allege that they have participation standing on all the issues in the petition for review because they "advocated for an update of the comprehensive plan and development regulations." [29] Since the County does not contest this claim, the Board assumes that during the update process the Petitioners raised the need to consider a change to the County's policies and regulations for allowing detached accessory dwelling units as separate residences for purposes of calculating residential densities. Therefore, Petitioners' appeal of the failure to update the accessory dwelling unit provisions of the County's plan and development regulations is not barred.

Conclusion: An update pursuant to RCW 36.70A.130(1) and (4) requires review and revision, if necessary, of all non-compliant provisions of a county comprehensive plan and development regulations. A petitioner that has raised an issue of non-compliance in the proceedings to adopt an update may bring that issue to the Board in a petition for review alleging failure to review and revise the issue raised below.

II. ORDER

For the foregoing reasons, the County's Motion to Dismiss Issue 2 is DENIED.
SO ORDERED this 10th day of January 2008.

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Margery Hite, Board Member

[29] *Ibid* at 5.

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Holly Gadbaw, Board Member

James McNamara, dissenting:

Because I believe that current case law supports the interpretation that the Board's review is limited to those sections of the comprehensive plan which the County has amended, or which must be brought into compliance with intervening legislative amendments, I dissent.

RCW 36.70A.290(2) requires that all petitions relating to whether or not an adopted comprehensive plan, development regulations, or amendments thereto, is in compliance with the GMA be brought within sixty days after publication. There is no dispute among the parties that this was not done. As noted above, the challenged provisions of the County's ADU regulations were enacted by the County in August 2002 through the County's adoption of Ordinance 725.[30] The 60 appeal period for challenges to that ordinance provided for by RCW 36.70A.290(2) expired on October 8, 2002.[31]

While doubtlessly untimely under RCW 36.70A.290(2), Futurewise argues, and the majority agrees that this provision is subject to challenge under RCW 36.70A.130.

RCW 36.70A.130(1)(a) provides, in pertinent part:

> (1) (a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. A county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.

In *1000 Friends of Washington v. Thurston County*[32] this Board stated with reference to RCW 36.70A.130(1) :

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[30] Motion to Dismiss Futurewise's Issue 2 as Untimely, at 1.
[31] Id. at 4.
[32] *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, FDO (July 20, 2005).

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> This requirement imposes a duty upon the County to bring its plan and development regulations into compliance with the GMA, including any changes in the GMA enacted since the County's adoption of its comprehensive plan and development regulations. While some provisions of the County's plan and development regulations may not have been subjected to timely challenge when originally adopted, a challenge to the legislative review required by RCW 36.70A.130(1) and (4) opens those matters that were raised by Petitioner in the update review process. See RCW 36.70A.280(2). It is not, therefore, sufficient for the County to assert that its provisions regarding rural densities have not been changed; those provisions must themselves comply with the GMA.[33] (emphasis added)

While it is possible to read the language regarding the obligation to "bring its plan and development regulations into compliance with the GMA, including any changes in the GMA" to mean an obligation to conform to unchanged as well as changed portions of the GMA, this would expand the Board's ruling beyond its apparent intent. The issue under consideration was whether Thurston County's comprehensive plan rural land use designations were compliant with the statutory provisions for "limited areas of more intensive rural development" (LAMIRDs). As the Board stated Petitioner's position: "Petitioner urges that allowable residential densities on rural lands may not exceed one dwelling unit per five acres unless the rural designation complies with the requirements for a LAMIRD pursuant to RCW 36.70A.070(5)(d)."[34]

In that case, there had been intervening legislative changes to the GMA applicable to LAMIRDs between the time of Thurston County's original plan adoption and the 2004 update.

The Board stated:

> Prior to the adoption of RCW 36.70A.070(5)(d) in 1997, there had been no legislative guidance on how communities should deal with existing development in the rural areas that was already more intensive than a rural level of development. When the County adopted its comprehensive plan in 1995, it developed its own criteria for determining how to contain such areas of more intensive development in the rural

[33] Id. at 10.
[34] Id. at 9.

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> areas. In 1997, the legislature adopted the provisions of RCW 36.70A.070(d) that set the requirements for "limited areas of more intensive rural development" (LAMIRDs). ESB 6094 (1997). Now that there is direction in the GMA on how to address areas of more intensive rural development, the County's update must ensure that it complies with those terms. See *Futurewise v. Whatcom County,* WWGMHB Case No. 05-2-0013 (Order on Dispositive Motions, June 15, 2005)[35]. (emphasis added).

Thus, although the Board made it clear that Thurston County was wrong to maintain that it had no update obligations merely because its provisions regarding rural densities had not changed, there was a duty to bring its plan and development regulations into compliance based on changes in the GMA -- the adoption of RCW 36.70A.070(5)(d) in 1997.

Upon appeal, the Court of Appeals focused on the nature of Thurston County's obligation in relation to changes in the GMA. In *Thurston County v. Western Washington Growth Management Hearings Board*[36], the Court rejected the County's position that the Board could not review portions of the updated comprehensive plan and development regulations that the County did not amend in its periodic review. But *Thurston County* did not recognize a right to challenge portions of a plan or development regulation that, even though not amended, had not been affected by a change in the GMA.

The Court's analysis began by noting that "The Board held that RCW 36.70A.130(1)(a) imposes a duty on the County to bring its plan and regulations into compliance with the Act, including any amendments to the Act enacted since the County adopted the plan and regulations under review."[37] Thereafter, the Court's focus is solely on obligations relating to "amendments to the Act". The Court continued: "The Board noted that the County had enacted its comprehensive plan before the 1997 amendments to the Act added

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[35] In that order, the Board held, at p. 5: "The County's designation and regulation of limited areas of more intensive rural development must accord with the criteria in RCW 36.70A.070(5)(d). While those criteria were not in effect at the time that the County's comprehensive plan was first adopted, the update requirement applies to incorporate any GMA amendments into the review and revision of comprehensive plans and development regulations under RCW 36.70A.130."

[36] 137 Wn.App. 781, 154 P.3d 959 (2007), *petition for review filed.*

[37] Id. at 794.

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requirements for limited areas of more intensive rural development and that Futurewise was challenging this component of the plan."

In rejecting Thurston County's position that the Board may not review unchanged portions of its plans regardless of intervening changes in the GMA, the Court reasoned that "[T]he legislature has determined that, in managing growth, the benefits to the public of keeping abreast of changes in the law outweigh the benefits of finality to landowners."[38] (emphasis added). Nowhere in *Thurston County* did the Court hold that changes in the law were not a necessary condition for Board review in the absence of a plan amendment. This is hardly surprising since the issue of the County's obligations regarding LAMIRDs was one where there had been a change in the GMA.

As an alternative position, Thurston County suggested that, if the Court concluded that it could review unchanged provisions of a county's comprehensive plan and development regulations, the Court should limit such review to those provisions that do not comply with "stricter" Act requirements. [39] That the Court rejected this position does not mean however, that the Court was implying that unchanged provisions of a plan were subject to review even if there had been no change to the GMA. Instead, the Court rejected an interpretation that would give the Board jurisdiction where the GMA had imposed stricter requirements, but deprive it of jurisdiction where the GMA weakened requirements. The Court stated that it "doubted that the legislature intended such an uneven result. We also question whether the legislature intended to burden the Board with the threshold jurisdictional question of whether an Act amendment is stricter, less strict, or somewhere in between what the Act required before the amendment." [40] In any of those scenarios – stricter, less strict, somewhat in between – the Court was considering types of legislative changes to the GMA. That the Court did not envision the Board in the role of judging the level of strictness of an

[38] Id. at 794-95.
[39] Id. at 795.
[40] Id. at 795-96.

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amendment does not mean, however, that the Court accepted that the Board had jurisdiction in the absence of any amendment at all.

Granting the County's motion to dismiss Issue 2 would also be consistent with this Board's and Division I of the Court of Appeals' decisions in *Futurewise v. Whatcom County and Intervenors Gold Star Resorts, Inc.* In the underlying case, this Board held:

The County's designation and regulation of limited areas of more intensive rural development must accord with the criteria in RCW 36.70A.070(5)(d). While those criteria were not in effect at the time that the County's comprehensive plan was first adopted, the update requirement applies to incorporate any GMA amendments into the review and revision of comprehensive plans and development regulations under RCW 36.70A.130.[41]

On appeal, the Court in *Gold Star Resorts v. Futurewise*,[42] first rejected Gold Star's argument that provisions of the plan left intact did not have to comply with current GMA requirements, calling this a narrow and cramped reading of the statute.[43] Instead, the Court held that "We agree with the Board that the review statute requires cities and counties to bring their plans into compliance with intervening legislative amendments. *See, 1000 Friends of Wash*., 159 Wn.2d at 170 (seven year review properly included amendments to comply with substantive requirements added after plan initially adopted.)"[44] The Court stated that RCW 36.70A.130 "provides the vehicle for bringing plans into compliance with recently enacted GMA requirements". [45]

But the Court also rejected Futurewise's position that the county must revisit every aspect of its plan. Instead the update obligation pertained to "only those which are affected by

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[41] *Futurewise v. Whatcom County and Intervenors Gold Star Resorts, Inc, WWGMHB Case No, 05-2-0013* Order on Dispositive Motions, June 15, 2005.
[42] 140 Wn.App. 378, 166 P.3d 748 (2007), *petition for review filed.*
[43] Id. at 390.
[44] Id.
[45] Id.

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intervening legislative revisions".[46] And, if further clarification were necessary: "We hold that the review statute requires Whatcom County to amend its comprehensive plan as necessary to comply with GMA amendments that came after adoption of the plan." (emphasis added).[47]

In light of the prior decisions cited above, both by the Board and Divisions I and II of the Court of Appeals, I would hold that the County's ADU ordinance, because it has not been amended since adoption in 2002, and because there have been no intervening amendments to the GMA affecting it, is not subject to appeal. I would dismiss Issue 2 as untimely.

Accordingly, I respectfully dissent.

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James McNamara, Board Member

This is not a final order. It will become final upon entry of the Final Decision and Order in this case.

[46] Id. at 391.
[47] Id.

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